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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. ~~2-10~~ /

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY,
BYRON A. CAIN, FRANK J. HUEBNER, AND
HAROLD E. SULLIVAN.

THE SHOTWELL MANUFACTURING COMPANY,
BYRON A. CAIN, FRANK J. HUEBNER, AND
HAROLD E. SULLIVAN,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA.

**MOTION FOR LEAVE TO WITHDRAW AS
COUNSEL FOR FRANK J. HUEBNER.**

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,

*Counsel for Respondents Cross-
Petitioners The Shotwell Man-
ufacturing Company, Byron A.
 Cain and Harold E. Sullivan.*

WINSTON, STRAWN, SMITH & PATTERSON,
38 S. Dearborn Street,
Chicago, Illinois,

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
130 E. Randolph Drive,
Chicago, Illinois,

Of Counsel.

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Now come Harold A. Smith, George B. Christensen, Howard Ellis and William T. Kirby, and move that they be permitted to withdraw as attorneys of record for Frank J. Huebner, who has filed a motion herein *In Propria Persona* consenting to the Government's position in all matters now pending before the Court. In support of their motion, movants attach the affidavits of Neal J. McAuliffe and George B. Christensen and the consent of said Huebner to their withdrawal; and respectfully show:

On December 14, 1956, movants learned for the first time that in August or September, 1956, Huebner, under circumstances not known to movants, testified before the April 1956 Term Grand Jury, which, *inter alia*, has been investigating this case. Events subsequent to December 14, 1956, have demonstrated to movants that Huebner for some months has not relied upon them as his attorneys, and he appears to be fully within the control of Government counsel.

Movants show by the annexed affidavits that Huebner for some time has been seriously upset because of the strain of this protracted prosecution.

Movants make the following points with respect to the motion of Huebner and to illustrate the propriety of relieving movants of responsibility as counsel for him:

1. Huebner is basically mistaken in consenting that this Court grant certiorari for the reason that a question as to a detail of the former "voluntary disclosure" policy no longer is (if it ever was) a question of public importance and for the other reasons set out in movants' opposition to certiorari.

2. Huebner is basically mistaken in consenting that the case should be remanded to the District Court for a supplemental suppression of evidence hearing as to "timeliness" of the disclosure because Government counsel admit the disclosure in any event was made in July 1948. The Treasury had not "initiated investigation" (as that phrase is defined by the controlling "Wenckel objective test") by that date; in fact, never did initiate an investigation independently of that flowing from disclosure. That a disclosure was made is uncontested, and, whether in January or July 1948 (or some intermediate date), it was timely under Treasury rules. These salient facts, movants believe, cannot be avoided by any affidavit which Huebner may have given.

3. Huebner is basically mistaken in consenting to the motion to remand because that motion does not

show the existence of such new evidence and such diligence as are necessary to support a motion for a partial new trial on the ground of newly discovered evidence.

4. Huebner is basically mistaken if he is under the impression that by consenting to the Government's motion he may (should the convictions ever be affirmed) escape the sentence originally imposed by the District Court because the mandate of the Court of Appeals has not been stayed; under Criminal Rule 35, the District Court long since lost jurisdiction to change the sentence (Cf. *U. S. v. Hunter*, 162 F. 2d 644).

5. Huebner is without legal training and is un-equipped to decide, or to advise, the Court, whether the Government ever may move for a new trial in a criminal case on the ground of alleged new evidence. Yet it would appear that he committed himself to his present course of action without legal advice.

Movants cannot prevent Huebner from making legal mistakes which they believe are detrimental to him and are not helpful to the Court; they should be permitted to withdraw.

Respectfully submitted,

HAROLD A. SMITH,

GEORGE B. CHRISTENSEN,

HOWARD ELLIS,

WILLIAM T. KIRBY,

Counsel for Respondents-Cross-

Petitioners The Shotwell Man-

ufacturing Company, Byron A.

Cain and Harold E. Sullivan.

WINSTON, STRAWN, SMITH & PATTERSON,

38 S. Dearborn Street,

Chicago, Illinois,

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,

130 E. Randolph Drive,

Chicago, Illinois,

Of Counsel.

January 4, 1957.

STATE OF ILLINOIS. } ss.
COUNTY OF COOK. }

NEAL J. McAULIFFE, being first duly sworn, deposes and says that movants heretofore have entered their appearance as counsel for all respondents and cross-petitioners in the foregoing entitled case; that affiant is a partner of Harold A. Smith and George B. Christensen, two of counsel of record for respondents and cross-petitioners herein, is familiar with the proceedings herein, and has worked as a lawyer on this case during all steps in the appellate proceedings.

That on December 12, 1956, Frank J. Huebner, who has filed a motion to withdraw from opposition to the Government's petition for certiorari, etc., in a telephone conversation with him, informed affiant that he "had his own lawyer," who was Frank J. Smith, 10 South La Salle Street, Chicago, Illinois; that he, the said Huebner, was "sick of the whole case"; that it would probably drag on for many more years, and that he wanted to get it over with one way or the other; that Huebner would not make answer to pertinent questions relating to the defense of the case but repeatedly told affiant that he would not discuss the matter further with affiant or his partners; that this was the first notice that affiant or any of the attorneys of record had that Huebner was not relying on them.

That on December 14, 1956, affiant had a conversation with said Attorney Frank J. Smith, who told affiant that he, the said Smith, was not well informed as to the case but that Huebner had told him that he had testified before the Grand Jury in August or September, 1956, and before seeking legal advice from him; that affiant suggested to Smith that Huebner apparently had acted without any independent legal advice whatsoever, and that affiant did

not believe that Huebner knew what his rights or duties were, that the pressure of years of litigation and perhaps continuous pressure and threats or promises by Treasury Agents, unbeknown to affiant and his partners, had reduced Huebner to a state where he was so mentally upset that he should be allowed to take no action whatsoever without advice of competent independent counsel; that Attorney Smith told affiant that in view of the fact that Huebner had dealt with representatives of the Treasury unbeknown to affiant or his partners, or before retaining him, and from the tenor of Huebner's recent communications with him, he was convinced that Huebner had made up his mind not to oppose the Government and that he believed there was nothing he could do about it; Smith said he expected to see Huebner Saturday afternoon, December 15th, and learn more about the case and Huebner's attitude.

(Sgd.) NEAL J. McAULIFFE.

Subscribed and sworn to before me this 3rd day of January, 1957.

(Sgd.) JANE NEIS.

(NOTARIAL SEAL)

• Notary Public.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

GEORGE B. CHRISTENSEN, being first duly sworn, on oath deposes and says that he is one of the attorneys of record herein; that on December 17, 1956, he had a conversation with Attorney Frank J. Smith, who is identified in the affidavit of Neal J. McAuliffe submitted herewith, in which affiant pointed out that the time within which the defendants were permitted to answer the Government's motion to remand would expire on December 22, 1956; that it was affiant's opinion that Frank J. Huebner should resist the motion to remand because even though he had testified before the Grand Jury, affiant and other counsel who had studied the case were of the opinion that he could have given no testimony that would invalidate the voluntary disclosure herein for the record indisputably showed that no investigation of Shotwell's tax returns, independent or separate from that flowing from the disclosure, ever had been made; that Huebner himself was not competent to decide, or to know, what constituted either a sufficient or a timely voluntary disclosure; that in the opinion of affiant Huebner was so distraught from years of litigation that he was not competent to protect his own interests in a complex legal matter and could become an easy victim of overzealous or misinformed Government agents.

Attorney Smith replied in substance that he had not had time to familiarize himself with the entire situation; that he did not know what Huebner's ultimate attitude would be but that at that time he would not consent that his name be recorded in opposition to the Government's motion.

Affiant told Smith that it was apparent that Huebner was no longer following, and no longer wanted, the advice

of present counsel of record; that although it was the opinion of affiant that Huebner needed advice from counsel fully familiar with the record, under the circumstances present counsel of record should be relieved of any duty to protect him.

On December 26, 1956, present counsel of record requested in writing that Huebner consent to their withdrawal, and on December 31, 1956, they were furnished the written consent to withdrawal dated December 27, 1956, submitted with this affidavit.

(Sgd.) GEORGE B. CHRISTENSEN.

Subscribed and sworn to before me this 3rd day of January, 1957.

(Sgd.) JANE NEIS,

(NOTARIAL SEAL)

Notary Public.

IN THE
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CONSENT TO WITHDRAWAL OF APPEARANCE.

I hereby consent to the withdrawal of Harold A. Smith, George B. Christensen, Howard Ellis and William T. Kirby as my attorneys in all phases of the above entitled matter.

Dated December 27, 1956.

(Sgd.) FRANK J. HUEBNER.